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MICHAEL RODAK, JR.

No. 71-1178

In The Supreme Court of the United States

OCTOBER TERM, 1972

GULF STATES UTILITIES COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
CITY OF LAFAYETTE, LOUISIANA,
CITY OF PLAQUEMINE, LOUISIANA,
Respondents.

***On Writ of Certiorari to The United States Court
of Appeals for the District of Columbia Circuit***

**PETITION FOR REHEARING SUBMITTED BY
GULF STATES UTILITIES COMPANY**

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June, 1973

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Upon the grounds set forth herein, Gulf respectfully petitions this Court for a rehearing of the decision filed May 14, 1973. The Certificate of Counsel required by Rule 58 is contained at the end of this Petition.

1. The error of the Court in holding that the FPC order provided "inadequate explanation" of the action it took, and in declining on that ground to review the finding.

The FPC Order was based solely on a finding that the allegations were irrelevant to the *purpose* of refunding previously authorized short-term debt and discussions were limited to such refunding purpose. Failure to note this is a critical oversight by the Court. The FPC finding (6),

read with the explanation in its Order quoted by this Court's opinion, clearly means that antitrust considerations are irrelevant to Gulf's issuance of bonds *because* such issuance merely accomplishes a refunding of short-term notes. Even if this Court would have stated more artfully the *reason why* the FPC made the finding, the FPC's stated reason should be found sufficient. This Court has said in similar circumstances, "We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words." *S.E.C. v. Chenery Corp.*, 317 U.S. 80, 95. In the face of extensive argument to the FPC in Gulf's Answer filed prior to issuance of the Order (R. 263, 265-7) that *Pacific Power & Light Co.* was controlling and that antitrust issues were irrelevant to all proceedings under § 204, the FPC Order was not based upon nor did it even refer to *Pacific Power & Light Co.* or on any stated position with regard to its general antitrust responsibilities under § 204 which were examined by this Court.¹ If the contentions of FPC counsel to the courts cannot be accepted by the courts "to take the place of agency findings," how can such contentions and arguments to the courts properly be used by the courts to broaden and make unclear an order otherwise *narrow* and *clear* on its face? If this Court has fear that broader grounds, though unstated, were the true basis of the order, then such fear is causing it to unlawfully usurp the FPC's action *as it stands*.

After granting intervention and reviewing Cities' allegations in relation to Gulf's application, the FPC *explained*

¹ This Court and the Court of Appeals both concluded that the intervenors' objections might have been rejected out of hand on the authority of *Pacific Power & Light Co.* without any justification therefor in the order of the FPC. See slip opinion, p. 6.

in its order that "The requested approval of the issuance of the Bonds allow that Company *only to change the form of a portion of its outstanding indebtedness . . .*" (Emphasis supplied) and that "There is *no relief* that the Commission can order *in authorizing the issuance of the Bonds for refinancing purposes* that would have any effect on the interest of the Petitioners, or solve any of the problems outlined by them."² (Emphasis supplied). The FPC then continued with a finding the clear import of which was that Cities' allegations were irrelevant to the purpose of Gulf's bond issue *because* the issue was merely to refund short-term debt theretofore authorized, which finding predicated its further finding that the allegations did not therefore "raise any issue which requires a hearing" with regard to the refinancing.³ The FPC then explicitly ordered that the funds be used solely to effect the refinancing. How can it be held, as this Court has done, that "no explanation" is provided?

The Court's refusal to accept the FPC's explanation of its action here is unjustifiably inconsistent with the standard of explanation accepted by this Court recently in *Camp v. Pitts*, No. 72-864, U.S. (March 26, 1973). In that case this Court *per curiam* found without any trouble that an explanation, which was much less complete than

² This explains the *reason why* allegations of antitrust violations were irrelevant to the bond issue. If any question is raised as to the scope of the FPC's concern with "relevance" by its discussion to the effect that "The alleged violations which petitioners attempt to raise *in this proceeding* are irrelevant to a requested authorization of securities" (Emphasis supplied), the narrow scope accorded in this case is made crystal clear by the specific *irrelevance* found in finding (6).

³ Both this Court and the Court of Appeals have glossed over the two distinct findings. In discussion relating to its holding that the FPC provides an inadequate explanation of its reason for finding Cities' allegations irrelevant to Gulf's security issuance [finding (6)], this Court refers to a portion of the Court of Appeals opinion which relates only to the adequacy of the FPC's statement of its reasons for *denial of a hearing* [finding (7)]. (See the portion of the opinion under caption *Replacement of Short-Term Notes*, 454 F.2d 941, 952-4. Pet. App. 20a-24a, inc.). The Court of Appeals did not mention, and it

that given in this case and was even deemed "curt," was sufficient for judicial review. While remand may seem a harmless cure-all, such inconsistency not only violates judicial and constitutional standards, but also produces waste of already overburdened administrative processes.

This case was disposed of by this Court simply on the basis of principles of review of administrative orders which are applicable to all administrative agencies. In its concentration on reviewing broad issues of anticompetitive responsibility and focus on maintaining consistency with its opinion in *Otter Tail Power Co. v. U.S.*,⁴ this Court has failed to give sufficient attention to the actual basis for its disposition of this case, and has thereby declined to review the very kind of consideration and determination that the opinion seems to require the FPC to make.

would seem that it could not have considered FPC finding (6) which finds Cities' allegations irrelevant and in which it clearly states its reason for so finding. The reason is so clearly stated there that it is incredible that it was the target of the Court of Appeals description as "cryptic." Such a description could only fit FPC's finding (7). While the FPC did not set out, as a part of its finding (7), its reason for finding that no hearing was required, the reason is self-evident in finding (6). After the FPC determined in finding (6) that the facts alleged by Cities were irrelevant insofar as authorizing the bonds was concerned because the bonds were merely to effect a refunding, going forward with a hearing to receive proof of their truth or falsity could be only a waste of time and serve no purpose in that proceeding. *United States v. Storer Broadcasting Company*, 351 U.S. 192, 205.

The pertinent FPC findings were:

"(6) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, are irrelevant to the purpose of issuing bonds to refund short-term indebtedness heretofore authorized by this Commission.

"(7) The matters asserted and activities alleged in the filed protest and petition to intervene by the Cities of Lafayette and Plaquemine, Louisiana, do not raise any issue which requires a hearing." Pet. App. 36a.

⁴ No. 71-995 decided February 22, 1973, reported 93 S. Ct. 1022.

CONCLUSION

For the reasons stated above, rehearing should be granted, the judgment of the Court of Appeals reversed, and the orders of the FPC approved.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

BENJAMIN D. ORGAIN, a member of the Bar of the Supreme Court and one of the Counsel appearing in this case on behalf of the Petitioner, does hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully,

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